COPY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 272

AZTECA FILMS, INC., a corporation,

Petitioner,

vs.

GENERAL CASUALTY COMPANY OF AMERICA, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

GENERAL CASUALTY COMPANY OF AMERICA, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Azteca Films, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 5, 1960.

Opinions Below.

The opinion of the United States District Court for the Southern District of California, Central Division, is unreported and is printed in Appendix A hereto, *infra*, pages A-1 to A-8. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 278 F. 2d 161, and is printed in Appendix B hereto, *infra*, pages B-1 to B-16. [R. pp. 153-165.]

Jurisdiction.

The judgment of the Court of Appeals was dated and entered April 5, 1960, and is printed in Appendix C hereto. [R. p. 166.] Rehearing was denied June 1, 1960. [R. p. 167.] The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

General Casualty Company, appellant, issued its Comprehensive Liability Insurance Policy to Azteca Films, Inc., appellee, the petitioner before this Court. When motion picture film owned by Azteca became deteriorated or unusable, it sent the same to American Cellulose Company which would inspect and choose which part, if any, it desired to purchase. While being transported via common carrier to American Cellulose and away from premises owned, rented or controlled by Azteca but before any purchase had been made by American Cellulose, Azteca's film caught fire, destroying a loading platform and surrounding warehouse buildings and their contents, as a result of which several damage suits were brought against Azteca. General Casualty denied coverage. It was stipulated that Azteca thereupon made provident settlement in good faith of the damage suits, the settlements being in excess of $100,000.00, the policy limits. General Casualty brought this proceeding to determine its liability under the Comprehensive Liability Insurance Policy.

In their respective briefs, in the trial court and also in the Court of Appeals, both General Casualty and Azteca took the position the only language of the policy, which

would be determinative of the questions presented, was the following language of an endorsement:

> "In consideration of the premium at which this policy is written, it is agreed that this policy does not apply to liability, claims or expense arising out of:
>
> "(1) The consumption, handling or use of or the existence of any condition in, any article or product manufactured, sold, handled or distributed by the insured, after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured, . . ."

The Court of Appeals reversed the decree of the trial court with directions to enter a decree for General Casualty. It was held that "possession" could have but one meaning—*actual* possession—so that no coverage existed even though there had been no completed sale and even though title at the time of the event still remained in Azteca.

The questions presented are:

1. Under applicable California law, is not the language of an insurance policy, where semantically susceptible of such construction, to be interpreted so as to provide, rather than to defeat, coverage?

2. There having been no sale and title having remained in Azteca, is not the word "possession" to be interpreted to mean "constructive" possession where to do so would result in coverage under the policy?

Statutes Involved.

The only statute involved is Title 28 U. S. C., section 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts

of Congress otherwise require or provide, shall be regarded as rules of decision in civil cases in the courts of the United States, in cases where they apply."

Statement of the Case.

The pleadings establish that General Casualty is a Washington (State) corporation, that Azteca is a California corporation, and that General Casualty "negotiated, consummated and issued in California" the insurance policy to Azteca "for a term of one year from July 22, 1953, to July 22, 1954." [R. pp. 3-4, Compl., pars. II and III, undenied, and par. VI; p. 9, Ans., par. II.] As alleged in paragraph I of General Casualty's complaint, the controversy involves a sum in excess of $3,000, exclusive of interests and costs, and is between citizens of different states—jurisdiction resting in the court of first instance by virtue of Title 28 U. S. C., sec. 1332(a)(1).[1] Jurisdiction of the appeal to the Ninth Circuit Court of Appeals existed under and pursuant to section 1291 of Title 28 U. S. C.

The fire, giving rise to the various damage suits brought against Azteca, occurred July 15, 1954.

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[1]Not disputed appears to be that, since Federal jurisdiction here stems from diversity of citizenship, California law governs interpretation of the policy issued to the California corporation (Azteca) in California, and California law is to be applied. (*Standard Acc. Ins. Co. of Detroit, Mich. v. Winget*, 9 Cir., 197 F. 2d 96, 99.) Where, as here, the contract either does not indicate a particular state for performance (*Ringling Bros.-Barnum & Bailey C. Shows v. Olvera*, 9 Cir., 119 F. 2d 584; *John Hancock Mutual Life Ins. Co. v. Dorman*, 9 Cir. 108 F. 2d 220, 223), or calls or may call for performance in different states (*Bertonneau v. Southern Pac. Co.*, 17 Cal. App. 439, 445, 120 Pac. 53; *Smith v. Onyx Oil & Chem. Co.*, 3 Cir., 218 F. 2d 104, 110-111), it is ruled that the law

Azteca was engaged in the business of distributing Spanish language motion picture films to theatres for showing. Its main headquarters were in Los Angeles, California. It had a branch office at San Antonio, Texas. Films were of two types—safety and non-safety, the former being called acetate film and the latter nitro-cellulose film. It was stipulated [R. p. 28, par. IX], "That nitro-cellulose films are highly combustible and subject to spontaneous combustion. That acetate films are slow-burning and will burn if held in a flame, but generally cease burning soon after the flame is removed."

Through use and old age, film would become worn out and unusable. When an entire reel became unusable and was to be discarded, the film was removed from the reel and became "junk film." [R. p. 57; p. 106.] It is this junk film which here was involved.

When any of the five film examiners or inspectors told Mr. Ayala that certain film was felt to be discarded, he would inspect it and make the determination. If he decided it was to be discarded, it would be put in steel drums or barrels [R. pp. 66-67] furnished by American Cellulose Company. [R. pp. 60-61.] The films here involved were "junked" and placed in steel barrels or drums received by Azteca in November of 1953 and were kept

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of the place where it was made governs. See also: *Backgaard v. Carriero*, 9 Cir., 237 F. 2d 459, 464, fnte. 3; *New York Life Ins. Co. v. Waterman*, 9 Cir., 104 F. 2d 990; *Braun v. New York Life Ins. Co.*, 46 Cal. App. 2d 335, 115 P. 2d 880; *Blair v. New York Life Ins. Co.*, 40 Cal. App. 2d 494, 104 P. 2d 1075; 11 Cal. Jur. 2d 149, sec. 63; and *Southwestern Fire & Cas. Co. v. Kovar*, 227 Miss. 386, 86 So. 2d 356, 358. The policy provides coverage of the assured anywhere "within North America or any possession of the United States" and does not specify or indicate performance is to be in any particular state but calls for coverage and defense of the assured in all states and possessions as well as elsewhere. California law governs.

exposed in the alley, adjoining the building where, from at least June 1st, the direct rays of the sun would hit each day. [R. pp. 84-85; p. 91.] Junk film, so placed, consisted of both safety (acetate) and non-safety (nitrocellulose) film. [R. p. 68.]

Commencing about August of 1947, Azteca had made arrangements with American Cellulose Company, regarding junk film. American Cellulose furnished the assured with the steel drums or barrels in which to ship the junk film to it. [R. pp. 60-61.] Although the insurer, General Casualty, asserted both at the trial and on the appeal (three of its four points on appeal) that the arrangements between its assured, Azteca, and American Cellulose Company resulted in a present and completed sale of the film to American Cellulose at and prior to the fire, the trial court found that no sale had been completed and that title to the film still remained in Azteca. The Court of Appeals accepted as correct these findings and determination, which accorded with established California decision. (See: *Jue Yee v. Ch. Tetzen & Co.*, 12 Cal. App. 54, 106 Pac. 594; *Goldberg v. Southwestern Metals Corp.*, 92 Cal. App. 2d 819, 821, 208 P. 2d 75, and others in Appellee's Brief, Point III.)[2]

By July of 1954, four barrels had been filled with junk film. These were involved in the fire. [R. p. 61.] They were sealed and labeled—addressed to American Cellulose Company, in Indianapolis, Indiana—and Mr. Ayala called a motor carrier, Sunset Motor Lines, to pick up the four drums. [R. pp. 107-109.] Shipment was made July 14.

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[2]The briefs on appeal and the petition for rehearing have been certified and copies, accompanying the certified briefs and petition, have been presented to this Court.

1954, and consisted of a mixture of both safety and non-safety film, mostly non-safety. [R. pp. 74-75.]

The drums and film never reached American Cellulose. They were destroyed by fire July 15, 1954. American Cellulose had the sole right to first inspect and thereafter determine whether it would or would not accept any film. The film never reached American Cellulose which never inspected and never accepted any portion. The loss of the film was borne by Azteca which received no payment whatever therefor. [R. p. 82.]

The fire commenced in one or more of the drums which were then on the premises of Sunset Motor Lines at Dallas, Texas. The fire spread to and about the premises resulting in damages which were the subject of the various suits brought against the assured, Azteca. The fire was followed by an explosion in one or more of the drums containing the film. [R. pp. 26-27, Stip., pars. II and IV.]

Six separate suits for damages were brought against Azteca—the largest claim being for $284,000.00 by Sunset Motor Lines. Following demand by Azteca to defend and General Casualty's refusal so to do, Azteca undertook its own defense. It was able to settle the six claims for an amount in excess of $100,000.00, the policy limit, to-wit, for the sum of $117,500.00. It was stipulated that the settlements made by the insured "were provident, reasonable and made in good faith" and that Azteca would not assert a claim in excess of the policy limit. [R. p. 27, Stip., pars. V and VI.]

The cause was submitted on simultaneous briefs in the trial court. Both parties took the position that the material and decisive portion of the policy was only that portion of the exclusionary clause heretofore quoted in

"Questions Involved." No other portion was advanced. This likewise is true of that which was advanced by the parties in their briefs on appeal. (Appellant's Opening Brief, p. 2, Statement of Cause; Appellee's Brief, pp. 2-3, Statement of the Case.) In its written (unreported) opinion (Appendix A, *infra*), the trial court considered this portion of the exclusionary clause. The trial court rendered and filed its findings, conclusions and judgment in favor of the assured, Azteca, holding that coverage did exist and that General Casualty was liable. The Court of Appeals for the Ninth Circuit held that "possession" as used in the said exclusionary clause necessarily and as a matter of law means *actual* possession and not constructive possession which follows title, and thereupon directed reversal with directions to enter judgment for the insurer, General Casualty Company. (Appendix B, *infra*.) It is the judgment of the Court of Appeals (Appendix C) which here is presented for review.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals misinterprets and misapplies governing California law pertaining to the construction of exclusionary clauses in insurance policies; the exclusionary clause must be construed and interpreted to afford coverage where it is "susceptible" or "semantically permissible" of such a construction.

2. The decision of the Court of Appeals conflicts with decisions by this Court and other courts to the effect that "possession" is one of the most ambiguous words known, and conflicts with the principles of California law under which it must be construed to mean "constructive" possession where such a construction would result in coverage of the loss incurred.

I.

The Decision of the Court of Appeals Misinterprets and Misapplies Governing California Law Pertaining to the Construction of Exclusionary Clauses in Insurance Policies; the Exclusionary Clause Must Be Construed and Interpreted to Afford Coverage Where It Is "Susceptible" or "Semantically Permissible" of Such Construction.

In *Wildman v. Government Employees' Ins. Co.*, 48 Cal. 2d 31, 35-36, 307 P. 2d 359, the established California rule was expressed as follows by the California Supreme Court:

> ". . . 'It is elementary in insurance law than any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. (Citing California Supreme Court decisions.) *If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates.* (Citing California Supreme Court decision.) *If the insurer uses language which is uncertain, any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against* (citing California Supreme and District Court cases) *or the person or persons protected* (citing California Supreme and District Court cases), *the language will be understood in its most inclusive sense, for the benefit of the insured.*' (*Continental Cas. Co. v. Phoenix Constr. Co.*, 46 Cal. 2d 423, 437, 438 [296 P. 2d 801].)" (Italics added.)

The italicized language was quoted and followed in *Arenson v. National Auto & Cas. Ins. Co.*, 48 Cal. 2d 528, 539, 310 P. 2d 961, and the entire quotation from the

Continental Cas. Co. case was set forth and followed in *Ensign v. Pacific Mutual Life Ins. Co.*, 47 Cal. 2d 884, 888, 306 P. 2d 448.

General Casualty conceded that the Comprehensive Liability Insurance Policy, issued by it to Azteca, would provide coverage here unless, but only unless, affirmatively excluded by reason of the exclusionary clause. [R. p. 69, fol. 58 to p. 70, fol. 60; p. 70, fol. 62 to p. 71, fol. 65.] This is an exception to or restriction upon the broad and comprehensive coverage otherwise provided.[3]

Berliner v. Travelers' Ins. Co., 121 Cal. 458, 461, 53 Pac. 918, points out that such exceptions or restrictions are to be construed "strictly" against the insurance company, and further that if there be any "doubt whether the words of the policy were used in an enlarged or restricted sense, other things being equal," the construction must be adopted which favors the insured. This well-established California rule was followed in *Pendell v. Westland Life Ins. Co.*, 95 Cal. App. 2d 766, 770, 214 P. 2d 392, holding that exceptions, seeking to limit the insurer's risk, are "to be construed most strongly against the insurer and in favor of the insurer." As pertinently expressed by the California Supreme Court in *Ireland v. Firemen's Fund Indemnity Co.*, 30 Cal. 2d 541, 548, 184 P. 2d 153:

> "A cardinal rule of interpretation is that, where a provision of an insurance policy is *susceptible* of two constructions, it should be construed most favorably

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[3]California holds that the burden rests upon the insurance company to prove itself clearly within the exception on which it relies as exempting it from responsibility; this accords with rules generally prevailing. (*Mattson v. Maryland Casualty Co.*, 100 Cal. App. 96, 98, 279 Pac. 1045. Note: *Howe Ben. Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 S. Ct. 332; *American Indem. Co. v. Sears, Roebuck & Co.*, 6 Cir., 195 F. 2d 353, 355.)

> in favor of the policyholder. (Citations.) . . . If the insurer intended to restrict its coverage to the extent of its defense in the present case, *it should have used language clearly stating that purpose.*" (Italics added.)

Or, as so graphically stated in *Fageol T. & C. Co. v. Pacific Indemnity Co.*, 18 Cal. 2d 731, 747, 117 P. 2d 661:

> "If to give the quoted clause the meaning contended for release Detroit [the insurer] from liability, then it *must* be construed so as *to permit recovery* since it is '*susceptible* of such construction.'" (Italics and words in brackets added.)

The *highest* court of California thus rules in favor of coverage of the loss incurred by the assured where the insurance policy language is "susceptible" of such construction; where such construction is "semantically permissible."

It is true that language may be found in intermediate court decisions—*Trousdell v. Equitable Life Assur. Soc.*, 55 Cal. App. 2d 74, 81, 130 P. 2d 173; *Hobson v. Mutual B. H. & Acc. Assoc.*, 99 Cal. App. 2d 330, 333, 221 P. 2d 761, and *New York Life Ins. Co. v. Hiatt*, 9 Cir., 140 F. 2d 752, cited and relied on by the Court of Appeals in its opinion herein—to the effect that the policy language is to be viewed from what a layman would probably believe was meant thereby.[4] In each of these cases, that view was

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[4]Petitioner, as hereafter seen, does not believe that a laymen probably would consider that no coverage existed under the policy and endorsement. Insurance policies are couched in language difficult of solution by the trained legal mind—much more so to a lay-

taken for the purpose of *affording and upholding coverage*, in favor of the assured, and *not* for the purpose of defeating or denying coverage.

The Court of Appeals has misinterpreted and misapplied California principles which here control.

II.

The Decision of the Court of Appeals Conflicts With the Decisions of This Court and Other Courts to the Effect That "Possession" Is One of the Most Ambiguous Words Known, and Conflicts With California Principles Under Which It Must Be Construed to Mean "Constructive" Possession Where Such a Construction Would Result in Coverage of the Loss Incurred.

The Court of Appeals, in its opinion, considered crucial and determinative the meaning to be ascribed to "possession" in the exclusionary clause. If "actual possession" be meant, no coverage would exist; if "constructive possession" be permissible, coverage would exist. The language used was that of the insurer which annexed it to the comprehensive insurance policy.

The opinion erroneously, it is submitted, reasons that to a layman the word could mean only actual possession. The opinion further suggests that to construe the word so as to provide and permit coverage would be tantamount to rendering nugatory or meaningless the final language of the clause ("except equipment or other property rented

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man. In any event, the California rule seeks to provide for coverage where the language is susceptible of such construction. The California rule is opposed to releasing the insurer from responsibility unless the provisions and exclusions clearly leave no other alternative.

to or located for the use of others but not sold"),[5] although this language and thought had never been advanced to or considered by the trial court or even in either the appellant's or appellee's briefs on the appeal.[6]

However, to give "possession" the meaning of "constructive possession," and thus allow coverage to exist in favor of the assured, would not render nugatory or meaningless any portion of the exclusionary clause. To the contrary, it would give effective coverage as required by decisions of the California Supreme Court.

Had the concluding phrase of the clause the meaning or effect given to it by the Court of Appeals, the first one

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[5]Analysis instantly would reveal that this phrase here has no application. The film, while not yet sold, was at the time of the fire neither rented to or located for the use of others. General Casualty (and Azteca) correctly disregarded this phrase completely in presenting the case both in the trial and on the appeal.

[6]It is most questionable whether this may be done by an appellate court. (*Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 54 L. ed. 757, 30 S. Ct. 505, reversing Circuit Court of Appeals; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 356, 61 L. ed. 358, 359, 37 S. Ct. 170, "Therefore, even if the courts and parties were wrong about the proper basis for the suit, that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below."; *Gilby v. Travelers' Ins. Co.*, 8 Cir., 248 F. 2d 794, 797; *Corbin v. Baltimore & O. R.R.*, 6 Cir., 234 F. 2d 78, 81. In *Kershaw v. Maryland Casualty Co.*, 172 Cal. App. 2d 248, 255-256, 342 P. 2d 72 (hearing denied by California Supreme Court), appellant claimed on appeal that there was no liability by reason of "(f)(5)" of the exclusion; however, "the case apparently was tried on the theory that exclusion (f)(2) was the exclusion involved." In rejecting the appellant's claim and affirming the judgment, the Court quoted the following from *Ernst v. Searle*, 218 Cal. 233, 240-241, 22 P. 2d 715:

> "'The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. (2 Cal. Jur., §68, p. 237.)'"

to so contend would have been General Casualty which formulated the language and annexed it to the policy. But General Casualty at no time thought that the concluding phrase controlled or even had any bearing upon the meaning of "possession." Neither the insurer nor the insured considered it of any importance; neither advanced any argument based thereon. The concluding phrase was completely omitted from the quotation made by General Casualty of that portion of the exclusionary clause which it deemed and claimed would be "determinative of the coverage under the policy with respect to the subject of this litigation." (App. Ops. Br., p. 2.) If the insurance company, which drafted the language, itself placed no reliance thereon, it indeed is difficult to see how it may be said to have any bearing, especially in the manner advanced by the Court of Appeals. Certainly, to a layman, it would not have been considered as bearing on the matter. Not even the one who drafted it deemed it to bear thereon.

The Court of Appeals suggests that the concluding phrase would be surplusage and unneeded were petitioner to prevail. However, it is not unusual for an instrument to provide for inclusion (or exclusion) of particular matter and then by some further or additional language provide for the exclusion (or inclusion) of that which would not have fallen within the scope of the prior language. Such wording might be "redundant" in a manner of speaking. But this is neither unusual nor startling. It does not render "meaningless" either of the sets of phrases. For one to say—"White is not black and black is not white"—is not to say something which is nugatory or absurd. Each is meaningful and effective. To seize upon that which here has been seized upon by the Court of Appeals for the purpose of *defeating* coverage, is submitted to be con-

trary to the fundamental principles of law as expressed by the California Supreme Court in decisions, some of which have been mentioned in Point I, *supra*. Under these principles, coverage here does exist.

It was and is the position of Azteca through its laymen officers, as well as through its counsel, that coverage was intended to and did exist as to the loss here sustained. Yet the Court of Appeals has held that as a matter of law no coverage exists.

The meaning of "possession" is decisive. Since that word is semantically susceptible of a construction which affords coverage, it must be so construed. It may mean either actual or constructive possession. Here, coverage would exist where the meaning given is that which the trial court gave thereto, *i.e.*, constructive possession.

This Court itself has stated that: "both in common speech and legal terminology there is no word more ambiguous than 'possession.'"

> *National Safe Deposit Co. v. Stead*, 232 U. S. 58, 67, 58 L. Ed. 504, 509, 34 S. Ct. 209.

The opinion of the Court of Appeals conflicts with this holding.

The opinion of the Court of Appeals likewise conflicts with the holding of *Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co. of N. Y.*, 58 R. I. 16, 18-19, 190 Atl. 863, 864, where, in regard to "possession," it was held:

> "Its use in any insurance policy, unaccompanied by explanatory words to make clear the sense in which it is employed, would seem to be hazardous. The use of it in the exclusion clause of the policy in the instant case has clearly raised a serious question."

And, as further held therein:

> "Following the precedents of this court, and courts generally, ambiguous language in an insurance policy is to be construed most favorably to the assured."

It was concluded that the policy therein covered and protected the assured.

Like result was reached in *National Fire Ins. Co. v. Davis* (Tex. Civ. App.), 179 S. W. 2d 316, in which "custody" was held the equivalent of "possession" in an insurance policy. It was held that it was to be construed against the insurer in favor of the insured so that the word meant that the assured had "custody" although the goods at the time were actually in the hands of others.

Canadian Radium & Uranium Corp. v. Indemnity Insurance Co., 348 Ill. App. 171, 108 N. E. 2d 515, predicated its decision upon two grounds, neither of which can be ignored as dicta. In that case, title had not passed but was still in the assured although the item was in another's hands at the time of the occurrence which caused damage. The insurance policy contained an exclusionary clause similar to the one here involved. The insurance company claimed that it thereby was relieved of all liability and responsibility. One ground of the decision revolved around the word "possession" as used in the required factor—"after the insured has relinquished possession thereof to others." It was *held* (pp. 517-518):

> "The term 'possession' used in the policy, in our judgment, means legal possession, unless the contrary appears from the language in the policy. It is a well recognized rule of construction that an insurance contract will be construed in favor of the insured. (Citations.) In the Budelman case, the action was upon a

fire insurance policy, which extended liability "if any change other than by death of an insured takes place in the * * * possession of the subject of insurance * * * by voluntary act of the insured or otherwise. Plaintiff in the action was the vendor in a contract of sale of real estate, which contained no provision with respect to possession thereof. The vendee under the contract of purchase took possession but was not to get title until the purchase price was paid. A fire occurred, destroying the property, during the possession by the vendee. The defendant contended that there was a change in possession within the meaning of the policy, which barred recovery. The Court there said, 297 Ill. at page 217, 130 N. E. at page 515:

"'We consider a fair interpretation of this alienation clause to be that the term "possession" is used in its limited legal sense. From that conclusion it follows that there was no change in possession because legal possession follows the legal title. (Citations.)'"

In the words of this Court, both in common speech and legal terminology, there is no more ambiguous word than "possession." Nevertheless, the Court of Appeals here has held that as a matter of law it means actual possession—although this ascribed meaning operates to defeat coverage and is adverse to the insured—instead of constructive possession, which later would cause coverage to exist. The policy language does not require the meaning accorded by the Court of Appeals. The decision of the Court of Appeals conflicts with the decisions of this Court and of other courts, particularly with those of the California Supreme Court which require that the policy

be construed, if semantically susceptible, so as to provide coverage and protection to the assured.

Not merely has grave injustice been done to petitioner, the insured, but the decision by the Court of Appeals directly conflicts with prior decision of this Court, of other courts, and of the California Supreme Court in a most important field of law and in fundamental respects.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Henry F. Walker,
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George C. Lyon, and
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Dated: July 18, 1960.

APPENDIX A.

Opinion in the United States District Court for the Southern District of California, Central Division.

United States District Court for the Southern District of California Central Division.

General Casualty Company of America, Plaintiff, vs. Azteca Films, Inc., *et al.*, Defendants. No. 20,000—HW.

(Filed—June 12, 1958)

Defendant, Azteca Films, Inc., is engaged in the business of distributing Spanish-language motion picture films, primarily in Mexico. Its main headquarters are in Los Angeles, California, but it has a branch at San Antonio, Texas.

In its business of distribution of motion picture films, the defendant's distributees return the films to defendant. Films wear out through use. Consequently they must be reclaimed, patched and renovated. Often films cannot be renovated but must be discarded, with the result that from time to time defendant accumulated large amounts of discarded, unusable and scrap film.

Seeking a place to dispose of discarded, scrap film, in 1947 defendant contacted American Cellulose Company of Indianapolis, Indiana. An arrangement was made between defendant and American Cellulose whereby the latter agreed to purchase nitro-cellulose film which could be reclaimed. Containers were furnished by American Cellulose to ship the film. When the containers were filled defendant shipped them by public transportation to American Cellulose Company.

It appears there are two kinds of film: (1) Safety film—known as acetate film; and (2) Non-safety film—known as nitro-cellulose film. The American Cellulose Com-

pany agreed to purchase only the nitro-cellulose film. However, included in the shipments from time to time was safety film and film which was not reclaimable. As a consequence, when film was received by American Cellulose Company it was inspected, and acceptable film was retained, weighed and paid for and non-acceptable film destroyed.

In November, 1953 defendant Azteca received at San Antonio, Texas, from American Cellulose, five empty drums which were placed in an alley-way between two buildings occupied by defendant, without any protection from the elements. Some eight months later four of the drums were filled with film. They were sealed by defendant, properly marked for shipment, and delivered on July 14, 1954 to Sunset Motor Lines for shipment to American Cellulose Company. The Sunset Motor Lines picked up the drums containing the film at San Antonio, Texas, and transported them to its shipping warehouse in Dallas, Texas, where they were placed upon a loading platform. One day later—on July 15—fire developed in one or more of the drums, and as a consequence the drums of films, the loading platform and surrounding buildings were destroyed.

At the time of the shipment defendant Azteca Films, Inc., had an insurance policy with plaintiff General Casualty Company of America, which defendant maintained covered the loss involved. Notice of loss was given plaintiff but plaintiff's response was that the loss was not covered by its policy. Sunset Motor Lines, along with other owners of property destroyed by the fire, filed various actions against Azteca, alleging it was negligent in the handling or shipment of the films involved. Azteca, in accordance with the terms of its policy, demanded that plaintiff defend the actions in question, and again the in-

surance company denied liability. As the result of the fire six separate suits were filed against Azteca, the largest being for $284,000.00. Azteca was successful in compromising and settling said claims for $117,000.00.

Alleging that defendants claimed coverage under the insurance policy in question, General Casualty Company of America then filed this action for declaratory relief, requesting that this Court find there is no liability arising out of the insurance policy as a result of the fire and the subsequent loss. Plaintiff concedes that if it were not for an exclusionary rider, the policy would provide coverage for the loss involved. The policy provides coverage up to $100,000.00. Attached to the policy was the rider which plaintiff claims relieves it of liability. It reads, in part, as follows:

> "In consideration of the premium at which this policy is written, it is agreed this policy does not apply to liability, claims or expense arising out of:
>
> "(1) The consumption, handling or use of or the existence of any condition in, any article or product manufactured, sold, handled or distributed by the insured, after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured, . . ." Inasmuch as the policy was written by plaintiff, the policy language must be interpreted and construed most favorably to the insured and against the insurer.

Where the language is susceptible of two constructions, it should be construed most strongly in favor of the insured. (Pendell v. Westland Life Ins. Co., 95 C.A. 2d 706; Comunale v. Traders & General Ins. Co., 110 C.A. 2d 198).

Exceptions and conditions are construed strictly against the insurance company in whose favor they are made, and if there is any doubt whether the words of the contract were used in an enlarged or restricted sense, other things being equal the construction must be adopted which is most beneficial to the promisee. (Berlinger v. Travelers' Ins. Co., 121 C. 458).

> ". . .; if the insurer fails to use such language as to make the provisions of the contract clear any uncertainty or reasonable doubt is to be resolved against it; . . ."
>
> *Olson v. Standard Marine Ins. Co.*, 109 C.A. 2d 130.

If the language is susceptible to two reasonable constructions one of which leads to a conclusion of coverage and the other to the conclusion of non-coverage, the court should follow the construction which leads to the conclusion of coverage. (Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 C.2d 731; Wildman v. Government Employees' Ins. Co., 48 C.2d 31).

At the time the contract was written and the rider attached thereto, it is possible the parties believed that they understood the meaning of the words used. Unfortunately, however, the insurance company used in its rider words subject to several interpretations. In the case at bar in order that the insurance company escape liability it must be established that the loss arose out of the consumption, *handling* or use of, or the existence of *any condition in* any article or product manufactured, sold, handled or distributed by the insured after the insured *relinquished possession thereof* to others and away from the premises owned, rented or controlled by the insured.

According to testimony introduced, nitro-cellulose film is highly combustible and subject to spontaneous combus-

tion. The evidence further disclosed such film deteriorated with passage of time, and the rate of deterioration is particularly fast if the film is not properly cared for and is exposed to the elements. The drums in which the film was placed had been receiving some film for a period as long as eight months, and as they were not protected from the elements the film placed therein deteriorated. The more the deterioration the more likely spontaneous combustion. When the film was delivered to Sunset Motors there was no fire present in the drums. The fire must have been the result of spontaneous combusion.

There is no evidence before the Court to indicate American Cellulose Company designated Sunset Motor Lines as the carrier to be used. Consequently, when the film in question was delivered to Sunset Motors for shipment, it could be found that Sunset Motor Lines was the agent of Azteca. If "possession" means actual possession, then the defendant at the time of the fire did not have actual possession of the film in question. But if the term "possession" also includes constructive possession, then defendant could have had possession if the film was in the hands of its agent.

"Possession" is a word which has several meanings. The United States Supreme Court in *National Safe Deposit Co. v. Stead*, 232 U.S. 58, said, at page 67:

> ". . . there is no word more ambiguous in its meaning than possession."

There is a difference between possession and "legal" possession. In *Canadian Radium & Uranium Corp. v. Indemnity Ins. Co.*, 348 Ill. App. 171, 108 N.E. 2d 515 the Court said (quoting from a cited case):

> "'We consider a fair interpretation of this alienation clause to be that the term "possession" is used in its limited legal sense. From that conclusion it follows

that there was no change in possession, because legal possession follows the legal title . . .'"

If the foregoing states the rule correctly, there was no alienation of possession, because Azteca still retained legal possession for there had been no sale of the film at the time of the fire. The film was placed in drums, sealed and delivered to the common carrier for transportation to Indianapolis. Sale was not to be consummated until the arrival of the film, inspection by the purchaser, and a determination of the amount of film in the containers which would be accepted.

There has never been any contention by anyone that American Cellulose Company should pay Azteca for the scrap film destroyed in the fire. Azteca never made demand upon American Cellulose for payment, and American Cellulose has not in any way indicated it was liable for the film. The evidence will sustain a finding that legal title was still in Azteca.

At the time of the fire the film was away from the premises owned, rented or controlled by Azteca. To escape liability plaintiff must establish the fire was caused by the handling of the products involved. Again, "handling" is a word which is subject to several definitions. If "handling" means "shipping" and "shipping" includes the period of time from the moment the film was delivered to Sunset until delivery to American Cellulose, then the film was in the process of "handling." But if "handling" means movement, then there was no "handling", because the drums had been picked up by Sunset Motors, transported to its loading docks in Dallas and had come to rest at the time of the fire.

In the case of *Selective Logging Company v. General Casualty Co.*, 49 Wash. 2d 347, 301 P. 2d 535, the in

sured had loaded logs onto a railroad car which was moved from insured's premises. The car had been switched from place to place, but when the car was not in motion the logs shifted and fell onto a brakeman, killing him. Defendant insurance company denied liability and refused to defend the wrongful death action. The insured settled, and brought an action to recover the settlement and expenses incurred. The Court said:

> "The exclusionary provision involved in this case does not define the term handling. . . . The first clause of the exclusionary provision excepts liability arising out of the 'consumption, *handling* or use of or the existence of any condition in, any article * * * handled * * * by the insured.'
>
> "Respondent attempts to avoid ambiguity in the above provision by stating that transportation is handling. However, no authority is cited to sustain this bare assertion. The word 'handling' has been construed to have different connotations, varying with the environment in which it is framed, but none so broad as that contended by respondent.
>
> "While we believe appellant's asserted meaning of the word 'handling' is too narrow, we are convinced that the word cannot be extended to include transportation under the facts in this case.
>
> "If respondent is to bring the acts here within the exclusionary provision, it must do so by specific language that can be plainly and clearly understood. The exclusionary provision exempts a certain class of acts for which the insurer is not liable 'after the insured has relinquished possession thereof to others and away from the premises owned' by the insured. Although the accident happened away from the premises owned by the insured, the above quoted clause does not itself relieve respondent, since the accident did not arise

from handling the logs under any of the exclusions provided within the policy."

The Court will make the following findings:

1. The fire was not caused by the handling of the film.

2. The fire was caused by spontaneous combustion.

3. The insured had not relinquished possession to others.

4. At the time of the fire the film was away from premises owned, rented or controlled by the insured.

For the insurance company to escape liability it must be found that the fire was the result of handling the film when possession thereof had been relinquished to others. Inasmuch as the evidence will not sustain such a finding, judgment must be rendered in favor of the defendant.

Defendant is to recover on its counterclaim the limit of the policy plus interest thereon from the time settlement payment was made by defendant, together with expenses incurred in defending and settling the various actions filed against defendant because of the fire.

Counsel for defendant will prepare findings of fact, conclusions of law and judgment in conformity with this Opinion for presentation to the Court within the time provided by rules of this court.

Dated this ... day of June, 1958.

HARRY C. WESTOVER,

United States District Judge.

APPENDIX B.

Opinion in the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit.

General Casualty Company of America, a corporation, Appellant, vs. Azteca Films, Inc., a corporation, Appellee. No. 16,193. April 5, 1960.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens and Hamlin, Circuit Judges, and Lindberg, District Judge.

Lindberg, District Judge:

This is an appeal from a judgment in favor of the defendant, Azteca Films, Inc., a corporation, hereinafter Azteca, in an action brought by General Casualty Company of America, a corporation, hereinafter General, seeking declaratory relief. Jurisdiction in the district court was based upon diversity of citizenship under the provisions of 28 U.S.C.A. § 1332 and jurisdiction of this court upon appeal is under 28 U.S.C.A. § 1291.

By bringing the action General sought exoneration of liability to Azteca under an exclusionary clause of its blanket liability policy of insurance with the latter. Azteca counterclaimed, seeking judgment for the face amount of the policy, together with necessary expenses incurred in defending the claims which underlie the dispute here involved.

The policy of insurance involved covered the period from July 22, 1953 to July 22, 1954. It included coverage as to property damage liability to the extent of $100,000.

together with the obligation of the insurer to defend in the name of and on behalf of the insured any suit against the insured seeking damages for injury to or destruction of property. It was stipulated and conceded that the property damage resulting from the fire, hereinafter referred to, is within the coverage of said policy unless excluded therefrom by reason of the following language of the "Products and Completed Works Exclusion" attached to and a part of said insurance policy:

"PRODUCTS AND COMPLETED WORKS EXCLUSION' (BLP or FL only—Excludes business and professional products and completed works 'OFF' premises of insured)

"In consideration of the premium at which this policy is written, it is agreed this policy does not apply to liability, claims or expense arising out of:

"(1) the consumption, handling or use of or the existence of any condition in, any article or product manufactured, sold, handled or distributed by the insured, after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured, except equipment or other property rented to or located for the use of others but not sold;"

The policy was executed in the State of California, and it is agreed that the laws of the State of California control in the construction of the policy.

Azteca was in the business of distributing motion picture films to various theaters where they would be exhibited and then returned to Azteca. Film wears out with use and deteriorates with age, and upon the return of each film the same would be inspected by the insured and, if possible, renovated for reuse and further distribution. Film that could not be reused became "junk film." Bits

that might be cut out of an otherwise good film became "scrap film."

Seeking a place to dispose of discarded scrap and junk film, the insured in 1947 contacted American Cellulose Company of Indianapolis, Indiana, and arrangements were made whereby the latter furnished drums (which remained at all times the property of American Cellulose) to the insured in which to place the discarded scrap and junk film and which, when filled, were shipped by common carrier to and at the expense of American Cellulose Company. Upon arrival at American Cellulose the contents of the drum or drums would be inspected and segregated into that which could be used by American Cellulose and that which was useless. The useless was then destroyed and the useful would be weighed and payment, based on said weight and according to the current market, would be made to Azteca.

Included in the shipments of junk and scrap film there might be small amounts of acetate, *i.e.* "safety", film as well as nitrocellulose, *i.e.*, "non-safety", film. The film shipped might include both colored and black and white film. Some of the non-safety film would be in various stages of deterioration. Of all this only black and white, non-safety film relatively undeteriorated could be used and would be paid for by American Cellulose. It is significant to note that during all the years this arrangement was in effect film which was useless to American Cellulose was always destroyed and never returned to Azteca. No shipment was ever refused by American and no payment was ever questioned or refused by Azteca.

Pursuant to this arrangement five empty drums were shipped to a branch of Azteca at San Antonio, Texas, in November of 1953. Approximately eight months later

four of the drums had been filled with discarded scrap and junk film. The drums were sealed by Azteca, were addressed by it to American Cellulose and, on July 14, 1954, were shipped pursuant to uniform straight bill of lading, non-negotiable, to the consignee, American Cellulose, via Sunset Motor Lines, a common carrier, who picked up the drums and transported them to its shipping warehouse in Dallas, Texas, where they were placed on a loading platform. From there they were to be transshipped by connecting carriers to American Cellulose.

Non-safety or nitro-cellulose film is highly flammable and subject to spontaneous combustion. While the drums were on Sunset's loading platform in Dallas on July 15, 1954 fire developed in one or more of the drums as a result of spontaneous combustion and, as a consequence thereof, the drums of film, the loading platform and the surrounding buildings and their contents were destroyed by fire.

Several lawsuits were brought against Azteca for damages caused by the fire. General was timely tendered with the defense of these actions but declined on the ground that the liability was without the coverage of the policy based on the aforementioned exclusionary clause.

Azteca then hired counsel for the defense of said lawsuits and thereafter settlement was reached with respect to all claims. The amount of the settlement exceeded the limits of the policy although it was conceded that it was reasonable and prudent and that the hiring of counsel and the expense incurred were also necessary and reason-

able. The only issue presented was whether the claims which arose were within the Products and Completed Works Exclusion clause.

The question was decided by the trial court upon the assumption that the phrase "after the insured has relinquished possession thereof to others," appearing in the exclusion clause contained an ambiguity by virtue of the word "possession."[1] Resolving this ambiguity against the insurer, the court concluded that "possession" was intended and understood to mean "legal" or "constructive" possession.

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[1]In the trial court's opinion the following reference to the word "possession" is made:

"If 'possession' means actual possession, then the defendant at the time of the fire did not have actual possession of the film in question. But if the term 'possession' also includes constructive possession, then defendant could have had possession if the film was in the hands of its agent.

"'Possession' is a word which has several meanings. The United States Supreme Court in *National Safe Deposit Co. v. Stead*, 232 U.S. 58, said, at page 67:

"'* * * there is no word more ambiguous in its meaning than possession.'

"There is a difference between possession and 'legal' possession. In *Canadian Radium & Uranium Corp. v. Indemnity Ins. Co.*, 348 Ill. App. 171, 108 N.E. 2d 515, the court said (quoting from a cited case):

"'"We consider a fair interpretation of this alienation clause to be that the term 'possession' is used in its limited legal sense. From that conclusion it follows that there was no change in possession, because legal possession follows the legal title * * *"'

"If the foregoing states the rule correctly, there was no alienation of possession, because Azteca still retained legal possession for there had been no sale of the film at the time of the fire. The film was placed in drums, sealed and delivered to the common carrier for transportation to Indianapolis. Sale was not to be consummated until the arrival of the film, inspection by the purchaser, and a determination of the amount of film in the containers which would be accepted."

If the quoted phrase means giving up "actual possession" there would be no liability upon General for it is abundantly clear that the claims arose out of

(1) the existence of a condition in[2]

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[2]Stipulation IX of Stipulations dated February 24, 1958. (page 28 of the printed record) reads:

"That nitro-cellulose films are highly combustible and subject to spontaneous combustion * * *"

Also, the following colloquy took place between the court and counsel (pages 10 and 11 of Reporter's Transcript of Proceedings):

"The Court: Is there any evidence at all as to how the fire started? All you know is the fire started.

Mr. Groff: That is correct.

The Court: Inside the drums.

Mr. Groff: Yes.

The Court: You haven't got any evidence that anybody left a match in the drums?

Mr. Groff: Counsel has stated he doesn't so contend, your Honor, I believe.

The Court: You don't contend anybody left anything in the drums lighted in any way.

Mr. Groff: The evidence will show that there was nothing in the drums except the film.

The Court: I don't know what difference it would make. *I can't see what difference it would make if we agreed that the fire probably started by spontaneous combustion.*

Mr. Groff: That is perfectly all right with me, your Honor.

Mr. Moss: *We can't deny it, your Honor.*

The Court: All right.

* * *

The Court: *I was just trying to ascertain whether or not there was any issue here about how the fire started, and evidently there isn't any issue here.*

Mr. Moss: No, sir." (Emphasis supplied.)

The trial court in its opinion, after reviewing certain of the evidence, made the finding which is undisputed: "The fire must have been the result of spontaneous combustion." (Page 5, lines 28 and 29.)

(2) an article handled by the insured[4]

(3) after the insured had relinquished "actual possession" thereof to others, and

(4) away from the premises owned, rented or controlled by the insured.

On the other hand, if the phrase is to be construed broadly so as to include "constructive possession" or "possession in law" the issue could hinge on whether or not there had been a completed sale of the film. Appellant devoted its efforts below largely to proving or attempting to prove that there had been a completed sale. However, the court found otherwise and inasmuch as constructive possession follows title, which remained in Azteca according to the trial court's finding, and since the word "possession" was interpreted by the trial court to mean "constructive possession" the exclusionary clause was found

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[4]Appellee also advances the argument that appellant, to avoid liability under the policy, must prove that the liability arose out of the "handling" of the film by someone other than Azteca after Azteca relinquished possession. There is no merit to this contention for the reason that the clause provides for exclusion from liability arising out of the consumption, handling or use of or the existence of any condition in the article in the alternative. The disjunctive is used and cannot be ignored. If the claims arose out of a condition existing in the film after Azteca relinquished possession it is immaterial whether or not the film was being handled at the time of the fire or explosion.

Appellee also urges that appellant must further prove that the condition existing in the article came into existence only after the insured had relinquished possession thereof to others. The clause does not say that. If the claims arose out of a condition existing in the article it is quite immaterial just when the condition arose. Appellee's interpretation would render the insurer's liability coextensive with the insured's. The purpose of an exclusion clause is quite the opposite.

to be inapplicable and judgment was entered in favor of Azteca upon its counterclaim.

General in its appeal breaks its argument into four parts. The first three deal with the question of passage of title while the fourth urges that irrespective of whether or not there had been a completed sale Azteca had relinquished possession as contemplated by the endorsement. If General should be sustained on its fourth contention the question of whether there was a completed sale will become immaterial. We, therefore, examine the fourth contention first.

The first aspect of the question to be considered is whether the clause under examination—because of the word "possession"—is ambiguous. If it is, the familiar rules of strict construction against an insurer will become applicable. But any ambiguity must be real before the court is justified in invoking the rule. It is ambiguity, and not awkwardness of language which opens the door for construction.

Appellee cites many cases to the effect that the word "possession" is ambiguous. It was stated in *National Safe Deposit Co. v. Illinois*, 232 U.S. 58, 67, that "both in common speech and in legal terminology, there is no word more ambiguous in its meaning than Possession." There the word had been used in a statute. Other cases have quoted the language used by the Supreme Court. *Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co.*, 58 R.I. 16, 190 Atl. 863, quotes the above language and goes on to say that the use of the word possession "in any insurance policy unaccompanied by explanatory words to make clear the sense in which it is employed would seem to be hazardous." Appellee cites and the court below relied upon *Canadian Radium & Uranium Corp. v. Indemnity Insur-*

ance Co., 348 Ill. App. 171, 108 N.E. 2d 515, as a case involving an exclusionary clause not unlike the clause under examination. Appellee suggests that the decision there rested upon the meaning of the word "possession." The Illinois Court did say:

> "The term 'possession,' used in the policy, in our judgment means legal possession, unless the contrary appears from the language in the policy."

But more significantly the court found an agency relationship between the insured and those having actual possession of the property. The court concluded:

> "Therefore, Radium Industries' possession of the instrumentalities which caused the injuries in question, under such agency, must be deemed the possession of plaintiff and could not, under such circumstances, be considered a relinquishment of possession by the insured within the meaning of the exclusion provision."

It would seem to this court that such a solution to the problem would follow irrespective of the interpretation given to the word "possession." Possession in fact by an agent, all aspects of agency being satisfied, constitutes actual possession by his principal as distinguished from theoretical or constructive possession.[4]

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[4]The trial court below, while not making a finding that Sunset Motor Lines was the agent of Azteca, did state in his opinion: "There is no evidence before the Court to indicate American Cellulose Company designated Sunset Motor Lines as the carrier to be used. Consequently, when the film in question was delivered to Sunset Motors for shipment, it could be found that Sunset Motor Lines was the agent of Azteca." (Page 5, line 31.)

As we view the evidence it appears that no such finding could be made. Rather, it would appear that Azteca was acting on behalf of American Cellulose in calling Sunset Motor Lines to pick up the drums containing the junk film for delivery to American Cellulose.

While it is suggested that the exclusionary clause involved in *Canadian Radium* is like the exclusionary clause involved here, a close examination discloses a very important difference. The clause in *Canadian Radium* concludes thusly: "after the insured has relinquished possession thereof to others, anything contained in the printed conditions of this policy to the contrary notwithstanding." The clause involved here contains additional language and reads as follows: "after the insured has relinquished possession thereof to others and away from premises owned,

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While the drum loan memorandum (Exhibit 3) issued by American Cellulose Company to Azteca indicates the drums were shipped via Consolidated Forwarding Company to Azteca and provides under the caption "Remarks" the following:

"SHIP PROMPTLY BY: CONSOLIDATED FORWARDING COMPANY WHEN FILLED TO:
AMERICAN CELLULOSE COMPANY
PENDELTON PIKE AT KINGMAN DRIVE
INDIANAPOLIS, INDIANA

it appears from the testimony of Jewell Truex, Manager of the San Antonio Branch of Azteca, that Consolidated Forwarding Company was the carrier in and out of Indianapolis, that it did not operate in or out of San Antonio and further that similar shipments in the past originating with Sunset Motor Lines had been accepted and paid for by American Cellulose. The following testimony of Mr. Truex is pertinent on this issue, page 60 of Transcript of Record:

"Q. (By Mr. Groff): Mr. Truex, American Cellulose furnished to you certain drums over this period of time that you were manager for the purpose of shipping the film to American Cellulose, didn't they? A. Yes, they did.

Q. In each instance they furnished the drums to you they also forwarded to you a drum loan memorandum, didn't they?

A. Yes.

Q. I show you T for identification and ask you if that document, other than for the written matter in there, is not the form of document that was sent whenever drums were sent to you? A. Yes.

Q. Is that correct? A. Yes, it is the form.

Q. And this particular document, T, is that not a document that was sent to you in connection with the drums that were sent that were eventually involved in the fire in Dallas? A. Yes, it is.

* * *

rented or controlled by the insured, *except equipment rented to or located for the use of others but not sold.*" (Emphasis supplied.) As will appear later the italicized portion of the clause here involved performs an important function in the interpretation of the word "possession."

Doubtless the word "possession" standing alone often may be an ambiguous term. Courts give to the term varying shades of meaning. When called upon to construe the word in a statute or in a pleading courts will generally

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Q. Now, I call your attention to the Exhibit T for identification, which is in front of you, and I note that it shows, 'Ship promptly by: Consolidated Forwarding Company when filled,' and so forth. In connection with the other drum memorandums that were furnished to you, American Cellulose had on other occasions directed the carrier that you were to use to return the filled drums, hadn't they?

A. Yes. They usually specified a common carrier out there.

The Court: Just a minute. You mean to say when you got the empty drums they specified what carrier you were to use in sending the full drums back?

The Witness: Yes. They usually named a carrier.

Q. (By Mr. Groff): You made inquiry in connection with previous shipments prior to July 14, 1954, and found out that the carrier that they had designated was the ultimate carrier going to Indianapolis, and sometimes they didn't even come into Texas, that is true, isn't it?

A. I assume they were the ultimate carrier in Indianapolis, because we did not have out of San Antonio the carrier which they specified.

Q. Now, there were previous instances where they had specified carriers that didn't operate out of San Antonio and you shipped by Sunset, didn't you? A. Yes.

Q. And when these drums that were previously shipped arrived at American Cellulose in Indianapolis, they were accepted and you were paid for the nitro-cellulose films that were in them, weren't you? A. Yes.

Mr. Groff: May I offer this, your Honor?

The Court: It may be received in evidence as Plaintiff's Exhibit 3."

In light of the foregoing undisputed evidence it would appear that if the carrier, Sunset Motor Lines, was the agent of either it was the agent of the buyer, American Cellulose. See 13 C.J.S. §148, page 291.

give to it a legal or technical meaning. When found in a contract courts make every attempt to give to it the meaning understood by the parties when entering into the contract. This is not always easy, but the problem doesn't even exist if the word, in its context, is not susceptible of two meanings. The question is not whether a word is ever ambiguous, but rather when is a word ambiguous?

Ambiguity is not necessarily to be found in the fact that a word or phrase isolated from its context is susceptible of more than one meaning. As expressed by the Seventh Circuit in *Hill v. Standard Mut. Casualty Co.*, 110 F. 2d 1001, 1004:

> "To find that a word or phrase isolated from its context is susceptible to more than one meaning, or that a word or phrase in its context is susceptible to one reasonable and one unreasonable meaning, does not spell ambiguity."

Even in the case of *Canadian Radium & Uranium Corp. v. Indemnity Ins. Co.*, supra, relied upon by appellee, the court stated that in its judgment the term "possession" meant legal possession "unless the contrary appears from the language of the policy."

All rules of construction are subordinate to the leading principle that the intention of the parties, to be collected from the entire instrument, must prevail, unless inconsistent with some rule of law. *Chesapeake & Ohio Canal Co. v. Hill*, 82 U.S. 94. The test to be applied by the court in determining whether there is ambiguity is not what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance would have understood them to mean. *Trousdell v. Equitable Life Assur. Soc. of U. S.*, 55 Cal. App. 2nd, 74, 130 P. 2d 173; *New York Life Ins. Co. v. Hiatt* (9 Cir.) 140

F. 2d 752. In other words, the criterion is ambiguity from the standpoint of a layman, not from that of a lawyer. Where it is possible to adopt a construction which is favorable to the insured without doing violence to the policy wording that construction will be preferred. This anticipates a reasonable interpretation of the language and can apply only so far as the fair application of the ordinary meaning of language permits. But this rule of strict construction against the insurer cannot apply unless there is some reasonable basis for doubt. *Couch on Insurance 2d* states:

> "'Usual and ordinary meaning' has been stated variously to be that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal man, to a reasonable man, to persons with usual and ordinary understanding, to a businessman, or to a layman." Couch on Insurance 2d § 15:18, (citing among other cases the California case of *Hobson v. Mutual B. H. & Acci. Assoc.*, 99 Cal. App. 2d 330, 221 P. 2d 761.)

Applying these rules to the instant exclusionary clause, it would seem that the word "possession" as here used would convey to the ordinary mind, the layman, the idea of actual possession. The concept of constructive possession is the sort of concept that would more likely occur to a lawyer. Here the film had been sealed in American Cellulose's drum; it had been shipped pursuant to a uniform bill of lading consigned to the latter and at the expense of the latter; it had been delivered into the hands of a common carrier; its journey had been partially completed; whether or not the film would be usable by American for its purposes was a determination to be made exclusively by the buyer; if not usable it would be destroyed, it would not be returned to Azteca. Azteca would not be

asked whether or not the useless film should be destroyed. It was always destroyed as a matter of course, if not usable Azteca shipped the film knowing this is what would happen. If this does not amount to relinquishment of possession, as the term would be understood by a layman, it is difficult to conceive what additional facts and circumstances would be required. Assume arguendo that Azteca had disposed of its junk and scrap film by abandoning it upon some refuse pile upon premises owned, rented or controlled by others. Clearly this would be a relinquishment of possession to others, although no sale would be involved. But as to the unmarketable film that is in effect what Azteca did in the instant case.

There is yet another reason why the word "possession" as used here should not be construed to mean "constructive possession." Under California law where a written agreement attempts to cover all relationships of the contradicting parties, interpretation to be given the contract is determined, as a matter of law, solely from the instrument itself, if possible, *without making any part of the instrument nugatory*, or without reaching an absurdity, and the appellate court is free to adopt its own construction. *Republic Pictures Corp. v. Rogers*, (9 Cir.) 213 F. 2d 662, certiorari denied 348 U.S. 358; also, see Calif. Civil Code, §§ 1638, 1639 and 1641. Looking again to the entire exclusionary clause here involved it will be noted that while the clause removes certain situations from coverage, there is an exception to the exclusion; i.e., "except equipment or other property rented to or located for the use of others but not sold." The interpretation of the word "possession" urged by the appellee and found by the court below actually renders the above-quoted portion of the exclusionary clause nugatory if not absurd, for if the exclusion must relate to property "sold" and off the premises,

it is completely unnecessary to except thereform property rented to or located for the use of others but not sold. Paraphrasing the clause in this light and eliminating words having no application, it would read:

> "It is agreed that the policy does not apply to liability or claims arising out of the existence of any condition in any article handled by the insured, after the insured has relinquished 'title thereto (or sold)' to others and away from premises of the insured, except property rented to or located for the use of others but not sold."

As so read there would be an exclusion from coverage with respect to property that has been sold and off the premises, but the exclusion would not apply to certain property not sold, though off the premises. Such an exception would be redundant and entirely meaningless.

What the clause does say, and about this there can be no ambiguity, is that there is a kind of unsold property that does not come within the exclusion. This leaves the inescapable implication that certain other unsold property does come within the exclusion. This is entirely consistent with the interpretation of the word "possession" to mean actual possession and inconsistent with constructive possession.[5] As stated in 1 Couch on Insurance, 2d § 15:43:

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[5]In attempting to ascertain the general intent of the exclusionary clause here involved it is helpful to notice its title. The caption of a rider should be read and construed with the language of the rider itself. *Coit v. Jefferson Standard Life Ins. Co.*, 28 Cal. 2d 1, 168 P. 2d 163. The caption here reads:

"PRODUCTS' AND COMPLETED WORKS EXCLUSION

(BLP or FL only—Excludes business and professional products and completed works 'OFF' premises of insured)".

When this caption, and particularly the word "off" is kept in mind as the clause itself is read the conclusion that we reach that the word "possession" as therein used means "actual possession" is even more inescapable.

> "A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent."

It seems to us that the conclusion reached below actually requires straining. It is too technical from a layman's point of view. Reaching a strained interpretation of a contract is tantamount to rewriting the contract. This the court cannot do. See *Long v. West Coast Life Ins. Co.*, 16 Cal. 2d 19, 104 P. 2d 646.

We conclude, therefore, that the word "possession" was intended to mean "actual possession" and was not intended to mean "constructive possession." It appearing without dispute that actual possession had been relinquished, it must follow that the losses here involved were within the exclusionary clause exonerating General from liability therefor.

The judgment is reversed and the case is remanded with instructions to enter judgment for appellant.

(Endorsed) Opinion Filed April 5, 1960.

FRANK H. SCHMID, *Clerk.*

APPENDIX C.

United States Court of Appeals for the Ninth Circuit.

General Casualty Company of America, a corporation, Appellant, vs. Azteca Films, Inc., a corporation, Appellee. No. 16,193.

Judgment.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with instructions to enter judgment for the Appellant.

IT IS FURTHER ORDERED and adjudged by this Court, that the Appellant recover against the Appellee for its costs herein expended and have execution therefor.

ENDORSED: Judgment Filed and entered

(April 5, 1960)

FRANK H. SCHMID, *Clerk*.